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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of

Amendment of the Commission's Rules to Establish New Personal Communications Services

GEN Docket No. 90-314

To: The Commission

**BELLSOUTH COMMENTS ON FURTHER RECONSIDERATION
(BROADBAND PERSONAL COMMUNICATIONS SERVICE)**

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Before the
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Washington, D.C. 20554

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BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Cellular Corp. (collectively "BellSouth"), by their attorneys, hereby submit these Comments in response to the petitions for further reconsideration of the Commission's Broadband PCS policies and rules.^{1/}

SUMMARY

In these Comments, BellSouth supports several of the constructive proposals for improving the Broadband PCS rules in the petitions for reconsideration filed by CTIA, PCIA, and Comcast. These filings raise once again the important question of cellular eligibility to participate in the upcoming auctions. BellSouth urges the Commission to do

^{1/} *New Personal Communications Services*, Gen. Docket 90-314, *Memorandum Opinion and Order*, 94-144 (June 13, 1994), 59 Fed. Reg. 32,830 (June 24, 1994) (*Broadband Order*), *Further Order on Reconsideration*, FCC 94-195 (July 22, 1994), *reconsidering Second Report and Order*, 8 FCC Rcd. 7700 (1993). Petitions for reconsideration were filed by the Association for Maximum Service Television, Inc. ("MSTV"), the Association of Independent Designated Entities ("AIDE"), the Cellular Telecommunications Industry Association ("CTIA"), Celsat, Inc., Comcast Corp., Omnipoint, Corp., Point Communications Co., the Personal Communications Industry Association ("PCIA"), Puerto Rico Telephone Co. ("PRTC"), and jointly by Spatial Communications, Inc. and ArrayCom, Inc. ("Spatial/Array").

more than fine-tune the current rules and, instead, reconsider its decision to render cellular carriers (and their affiliates) ineligible to apply for more than a single 10 MHz license in-region. Two major recent developments warrant this reexamination: the establishment of auction rules for this service and the experience of the Narrowband PCS auction.

In establishing auction rules, the Commission set aside two Entrepreneur Blocks, which will account for nearly half the Broadband PCS licenses. These licenses are reserved for smaller companies, ensuring a large number of diverse participants in PCS in every market. Because the major cellular carriers are too large to qualify for these licenses, there is no way for cellular carriers to dominate Broadband PCS. Thus, the Commission need not continue imposing eligibility restrictions on cellular carriers for the non-Entrepreneur Blocks.

The recent Narrowband PCS auction shows that incumbent firms in a related field are likely to place the highest value on the spectrum being auctioned. For this reason, the current limitations on bidding by cellular carriers disserve the public interest and are inconsistent with the intent of Congress in authorizing auctions and the goals established by the Commission for this proceeding: universality, speed of deployment, diversity of services, and competitive delivery. Spectrum will not be put to its highest and best use, because the firms that can use the spectrum most efficiently and productively will be foreclosed from bidding on many of the licenses, and the auctions will not produce revenue for the public treasury reflecting the true value of the spectrum. An analysis of the bidding in the Narrowband auction shows that the cost to the public of the restrictions on cellular eligibility may be \$5.6 billion. The cellular restriction is not worth this cost.

The benefits of cellular participation are clear:

- greater auction revenue
- more efficient and productive use of spectrum
- greater variety of services

- faster deployment of new services
- more widely available service
- increased ability of affiliated telephone companies to provide new wireless services

The Commission has enunciated only two rationales for limiting cellular participation: maximizing the number of competitors, and the possibility that cellular carriers might act anticompetitively. The first of these reasons has become moot, now that the Commission has adopted the Entrepreneur Block plan, which provides for a wide variety of PCS licensees in every market and ensures that cellular carriers will not be able to dominate. The mere possibility of anticompetitive conduct is a matter the Commission said would not drive its policy decisions in this docket, and, in any event, the Commission's concern is simply not supported by the record:

- *Warehousing of spectrum is a virtual impossibility* given the high cost of obtaining a license in an auction and satisfying the build-out obligation, factors ignored by anti-cellular lobbyists claiming cellular carriers could block others from aggregating spectrum into 40 MHz blocks
- *Anticompetitive bidding strategies* to force up the price bid by others are extremely unlikely, given the high market value of PCS spectrum and the risk of submitting the winning bid
- *Aggregating cellular and PCS spectrum together into a single system* is unlikely to be possible for several years, because of time, cost, and usability constraints on dual-band equipment
- *The pleadings relied on to substantiate the possibility of anticompetitive conduct do not withstand analysis*, because they merely speculate about the possibility that cellular carriers could act anticompetitively, without any substantive basis

BellSouth submits that the optimal way to accommodate the competing public interest considerations in allotting Broadband PCS spectrum is to maintain the eligibility criteria for the Entrepreneur Blocks but eliminate the cellular eligibility restrictions and spectrum caps. This would allow open entry into the majority of the Broadband PCS spectrum, including

the 30 MHz MTA blocks. The public would thereby be ensured a diverse variety of competing service providers that respond to market forces. Cellular carriers would be able to provide services that complement their existing services, take advantage of economies of scope and scale in the delivery of service, rationalize their network architectures, and deploy the latest generation of wireless technologies and services. The public would be the clear winner in this scenario.

In the alternative, the Commission should apply only the recently adopted generic CMRS spectrum cap, in lieu of the 40 MHz Broadband PCS and 35 MHz cellular-PCS spectrum caps. Limiting cellular providers to only 10 MHz of Broadband PCS spectrum is simply insufficient.

If the Commission is unwilling to eliminate the cellular eligibility restrictions and fixed spectrum caps at this point, it should at least alleviate their negative effects. To this end, the Commission should consider establishing a short "sunset" on these restrictions, such as two years, and then allow cellular carriers to acquire more Broadband PCS spectrum in the secondary market. This would permit the redevelopment and redeployment of spectrum resources in response to customer needs, similar to the way SMR spectrum has been reconfigured through the marketplace to allow the emergence of Enhanced SMRs.

At a minimum, the Commission should undertake relatively minimal changes similar to those that CTIA and Comcast have suggested. Cellular carriers should be allowed to acquire 10 MHz of spectrum, in addition to an initial 10 MHz block, through secondary market transactions immediately, not 5 MHz five years down the road. Furthermore, cellular carriers that believe Broadband PCS technology is the best means to serve their customers' needs should be permitted to bid on the same basis as others, provided they divest any overlapping cellular operations. The Commission should also modify its spectrum attribution and overlap rules to avoid unnecessarily harsh and anomalous results.

Finally, BellSouth supports the cost-sharing proposal for microwave relocation made by PCIA in its petition. PCIA's plan will facilitate the orderly and fair transition of fixed microwave facilities to alternative technology.

DISCUSSION

I. **THE COMMISSION SHOULD ELIMINATE THE CELLULAR ELIGIBILITY LIMITS AND SPECTRUM CAPS FOR NON-ENTREPRENEUR BLOCKS**

CTIA and Comcast have petitioned the Commission to reconsider and fine-tune the rules for attributing cellular and Broadband PCS interests for determining eligibility and compliance with the spectrum caps. While the attribution rules need to be improved, as discussed in Section III below, BellSouth submits that a more thorough reexamination of the decision to limit cellular participation is warranted. For the reasons that follow, BellSouth urges the Commission to eliminate the limits on the eligibility of cellular carriers and their affiliates to bid for and hold Broadband PCS licenses, other than licenses in the Entrepreneur Blocks, including 30 MHz MTA licenses.^{2/}

A. **Reexamination of the Cellular Eligibility Limitations is Warranted in Light of the Adoption of Auction Rules and the Experience Gained in the Narrowband Auction**

Since the Commission released its *Broadband Order*, there have been two events of great significance to the limits on cellular participation in Broadband PCS: (1) the adoption

^{2/} BellSouth notes that the Commission has recently adopted a 45 MHz generic CMRS spectrum cap in PP Docket 93-252. *Commercial Mobile Radio Services*, Gen. Docket 93-252, *Third Report and Order*, FCC 94-212 (adopted August 9, 1994) (*CMRS Order*); see *News Release*, Report No. DC-2638, *Regulatory Framework for CMRS Completed* (August 9, 1994). In Section I of these Comments, BellSouth shows why the cellular eligibility limits and spectrum caps should be eliminated to give cellular carriers access to the 30 MHz MTA blocks. If the generic 45 MHz cap would preclude cellular carriers' access to the 30 MHz MTA blocks, it should be modified, and BellSouth reserves the right to seek reconsideration of the *CMRS Order*, if necessary.

of auction rules for Broadband PCS, including establishment of Entrepreneur Blocks; and (2) the successful completion of the first Narrowband PCS auction. For the reasons that follow, BellSouth submits that the cellular eligibility limits should be revisited in light of these events.

1. The Adoption of Broadband Auction Rules

Just two weeks after it released the *Broadband Order*, the Commission adopted its *Broadband Auction Rules* in PP Docket 93-253, which set forth the competitive bidding framework for Broadband PCS.^{3/} In particular, the *Broadband Auction Rules* set aside two blocks of spectrum (one 30 MHz and one 10 MHz block) as "Entrepreneur Blocks." The only applicants eligible for licenses in these blocks of Broadband PCS spectrum are smaller companies whose attributable finances fall under specified limits. Entrepreneur Block licensees are eligible to pay in installments, and bidding credits are made available to qualified small businesses and businesses owned and controlled by minorities and women in the Entrepreneur Blocks.

The Commission adopted these rules to address its concern that "large telephone, cellular and cable television companies" would win all of the licenses.^{4/} This scheme ensures that "nearly half" of the Broadband PCS licenses, representing one-third of the Broadband PCS spectrum, will be granted to small entities.^{5/}

This plan renders unnecessary the limits placed on cellular carriers' eligibility for Broadband PCS licenses, because the Entrepreneur Block plan alone completely achieves

^{3/} *Competitive Bidding*, PP Docket 93-253, *Fifth Report and Order*, FCC 94-178 (July 15, 1994), 59 Fed. Reg. 37566 (July 22, 1994) (*Broadband Auction Rules*), *recon. in part*, *Order on Reconsideration*, FCC 94-217 (Aug. 15, 1994).

^{4/} *Broadband Auction Rules* at ¶ 121.

^{5/} *Id.*

the purpose sought to be achieved through limits on cellular eligibility. In most markets, the existing cellular carriers will not qualify for the Entrepreneur Blocks due to their size,^{9/} thus ensuring the presence of two new non-cellular PCS licensees virtually everywhere. Nearly half of the licenses in every MTA will be granted to smaller companies, thereby limiting the number of licenses for which cellular carriers may bid. The Entrepreneur Block plan thus ensures that there will be a diverse variety of Broadband PCS licensees, including the kinds of companies that are not widely represented in the cellular industry.

Thus, the Entrepreneur Block plan fully achieves the goal of "maximizing the number of new viable and vigorous competitors" that was the underpinning of the cellular eligibility limit.^{2/} By maximizing the opportunities for new competitors to enter the wireless industry, the Entrepreneur Block plan wipes away the only justification for restricting cellular carriers' general eligibility for Broadband PCS licenses. BellSouth submits that the cellular eligibility limit achieves nothing that is not already ensured by the establishment of the Entrepreneur Blocks and therefore has no lawful basis.

2. The Experience of the Narrowband Auction

Reopening the issue of cellular eligibility is also warranted because of the experience gained as the result of the July 25-29, 1994 auction of nationwide Narrowband PCS licenses. There are a number of important lessons to be learned from that auction, as discussed

^{9/} According to the Commission, 86% of the nation's cellular service is provided by ten companies. *Broadband Auction Rules* at ¶ 108. None of the ten companies would qualify for the Entrepreneur Block.

^{2/} *Broadband Order* at ¶ 103. In the *Second Report and Order*, the Commission appeared to have based its cellular eligibility limits on the possibility of "unfair competition" and the "exercise of undue market power" by cellular carriers. 8 FCC Rcd. at 7744-45. In the *Broadband Order*, however, the Commission clarified its rationale, stating that its "goal in crafting these rules should not be to prevent anticompetitive behavior which may or may not materialize, but rather, to promote competition." *Broadband Order* at ¶ 103.

herein and in the affidavit of BellSouth's economic expert, Dr. Richard P. Rozek, which is attached as Exhibit I.^{8/} BellSouth also relies on a Declaration by Wayne D. Gantt, a financial and economic advisor to BellSouth, which is attached as Exhibit II.^{9/}

First, the auction showed that spectrum for the deployment of new wireless technologies is highly valued, and that a properly designed spectrum auction can produce considerable revenue for the fiscal benefit of the public.^{10/}

Second, the fact that all of the winning bids for Narrowband PCS licenses were by substantial companies involved in paging strongly suggests that spectrum is valued more highly by bidders who can use it to provide services that complement existing services or can take advantage of economies of scope and of scale based on existing services.

^{8/} Dr. Rozek is an economist and Vice President of National Economic Research Associates, Inc. He has previously held positions as the Deputy Assistant Director for Antitrust at the Federal Trade Commission and as a staff economist in that agency's Bureau of Economics. He has also been the economist for the Pharmaceutical Manufacturers Association and an assistant professor in the Department of Economics at the University of Pittsburgh. He holds a Ph.D. and M.A. in economics from the University of Iowa, an MA. in mathematics from the University of Minnesota, and a B.A. *cum laude* in mathematics from the College of St. Thomas.

^{9/} Mr. Gantt is currently a senior financial and economic advisor to the Democratic Party and to a range of governmental and corporate institutions, including the Coca-Cola Company, BellSouth Corporation, and Union Camp. He also serves as a Senior Advisor to the U.S. Department of State on international finance and the currency markets. For the past several years, Mr. Gantt has been Senior Vice President and Chief Economist at Interstate/Johnson Land, and investment bank in Atlanta, Georgia. He was a Senior Economist at SunTrust Banks, Inc. for nearly two years. Before that, he was a Senior Mathematical Economist for the U.S. Department of Labor's Bureau of Labor Statistics. Mr. Gantt also served as an Economist for the State of Alabama. He has been involved in economic and financial research for over 15 years. He was educated at the University of Alabama, Harvard University, and the London School of Economics. He is a widely cited commentator on the U.S. and international economies and has also contributed to economic publications.

^{10/} See Rozek Affidavit, Exhibit I at 6 (discussing revenue generated by Narrowband auction).

Third, the auction illustrates that revenue is maximized when incumbents providing similar services are eligible to participate fully. All six of the winning bidders are substantial existing wireless companies, or affiliates thereof. For the five paired 50 kHz channels, bidding by other companies stopped much lower than the winning bid. Each of the five 50 kHz paired channels was valued by the winning bidder at \$80,000,000, but the highest bids submitted by companies other than the six winners ranged from \$36,335,000 to \$60,727,000. The latter rounds of the auction for each license typically involved only the winner and a single runner-up, who was ultimately a winner of one or more of the other licenses.^{11/} In other words, much of the value captured through the auction was due to a small group of paging companies, the winners, bidding against each other. The valuations placed on the licenses by these companies were substantially higher than the values assigned to the licenses by non-winners.^{12/}

If existing paging companies had been excluded from the auction, or had been subject to a lower cap on the number of channels they could win, the auction would have produced much lower revenues -- as much as \$188,779,133 lower, based on the actual bids by non-winners.^{13/} Similarly, cellular eligibility limits and spectrum caps for Broadband PCS auctions will result in much less vigorous competition for these licenses, resulting in substantially diminished revenues. In fact, Dr. Rozek projects, based on the Narrowband

^{11/} See Rozek Affidavit, Exhibit I at 6-7 and Attachment B (derived from the FCC's unofficial round-by-round bid reports, obtained via the Internet from [ftp.fcc.gov/pub/PCS_Auctions/pcsrld*.txt](ftp://ftp.fcc.gov/pub/PCS_Auctions/pcsrld*.txt)).

^{12/} See *id.*

^{13/} See *id.* This is a conservative estimate. Dr. Rozek notes that the revenue loss could have been \$288,182,054 less if the six winners had not participated at all, eliminating bids that simply countered these six companies' bids. See *id.* at 7 n. 19.

bidding results, that "an estimate of *the loss of revenue to the U.S. government from the cellular eligibility and spectrum cap rules is \$5.6 billion.*"¹⁴ Dr. Rozek concludes:

[T]he cellular eligibility rules and spectrum caps inhibit the very competition the FCC and the Congress seek to encourage in PCS. By allowing cellular firms to participate fully in the auctions, the expected revenue generated from the auctions will likely increase due to the increase in competition from serious, viable firms; and the licenses will likely be awarded to the bidder who values them most highly.¹⁵

Thus, the experience of the Narrowband PCS auction militates strongly in favor of reevaluating the cellular eligibility limits and spectrum caps. Financial expert Wayne Gantt observes:

The economic consequences of an open and unfettered auction for PCS spectrum would: 1) allocate spectrum to the highest bidder; 2) raise a considerable sum of money for the U.S. Treasury; and 3) serve the intentions of the U.S. Congress. All of these goals are consistent with the public interest. Both the 20 percent attribution rules and the 10 percent population standard are restrictive to the market process.¹⁶

The restrictions on cellular participation are contrary to the purpose of holding auctions -- to take advantage of market forces for the distribution of licenses to those who value them most highly -- and, in the absence of any compelling justification for preventing the market from determining who should hold licenses, should be eliminated.

B. Open Eligibility for the Non-Entrepreneur Blocks Would Serve the Objectives Set by Congress, as Well as the Goals Set by the Commission

In Section 309(j)(3) of the Communications Act, Congress set specific objectives that the Commission was obliged to further in establishing eligibility criteria for services that will be subject to competitive bidding. BellSouth submits that opening up eligibility for the non-

¹⁴ Rozek Affidavit, Exhibit I at 7 (emphasis added).

¹⁵ Rozek Affidavit, Exhibit I at 3.

¹⁶ Gantt Declaration, Exhibit II at 3.

Entrepreneur Blocks would serve the objectives contained in Section 309 and the Commission's goals governing this proceeding -- universality, speed of deployment, diversity of services, and competitive delivery^{17/} -- far better than limits on cellular eligibility.

1. Efficient and Intensive Use of the Spectrum

Auctions promote economic efficiency, and the Commission has been directed to promote "efficient and intensive use of the electromagnetic spectrum" in establishing eligibility for participation in spectrum auctions.^{18/} The limitations on cellular eligibility for PCS licenses disserve this objective.

The value of competitive bidding as a licensing mechanism is that it allows the license to be awarded to the party that values it most highly -- *i.e.*, can use that spectrum most efficiently and productively. Limiting the eligibility of parties to bid interferes with the working of market forces, potentially rewarding less efficient, less productive use of the spectrum, because the party who values the spectrum most highly may be precluded from bidding. Dr. Rozek explains:

All else equal, restricting firms from participating in a new technology entails potential losses in economic efficiency. There is a risk of losing the most efficient provider of a good or service. Therefore, a policy of restricting a market participant should be carefully evaluated. . . .

There are two types of costs from restricting an efficient competitor and inhibiting the competitiveness of the auction to determine who will supply a good or service. First, there is a cost due to inadequate bidding competition. This would yield bid prices lower than necessary. Second, there is a cost from restricting an efficient provider of the underlying good or service that could translate into higher production costs on every unit of the good or service subsequently provided.

^{17/} *New Personal Communications Services*, Gen. Docket 90-314 & ET Docket 92-100, *Notice of Proposed Rulemaking and Tentative Decision*, 7 FCC Rcd. 5676, 5679 (1992).

^{18/} 47 U.S.C. § 309(j)(3)(D).

Allowing cellular providers to compete fully for broadband PCS licenses reduces the likelihood that an efficient provider will be excluded from the market. Permitting existing cellular providers to participate fully fosters service diversity, facilitates a more rapid development of the service, and potentially lowers production costs through economies of scope with existing services. . . . In addition, avoiding restrictions based upon current provision of competing services or ownership of licenses keeps an arbitrary and potentially awkward distinction out of the FCC regulatory process.^{19/}

Cellular carriers and telephone companies are likely to place a high value on Broadband PCS spectrum because a Broadband PCS license will enable them to provide services that complement, instead of merely duplicate, their existing services. They are also likely to value this spectrum highly because they would be able to provide Broadband PCS services in an efficient and cost-effective manner, due to economies of scope and scale. Dr. Rozek concludes that

[c]ellular providers have developed knowledge of technology, and made considerable investments in infrastructure that make them viable participants in PCS auctions to achieve an efficient allocation of PCS spectrum.^{20/}

Who values the spectrum most highly can only be determined by allowing all potential bidders to vie against each other for the spectrum at an auction. The Commission's limits on cellular eligibility ensure that this will not occur. Cellular carriers will only be permitted to bid for a single 10 MHz BTA block anywhere they provide even a small portion of the cellular service. They are entirely excluded from the 30 MHz MTA blocks. They cannot even compete with each other for the right to aggregate two 10 MHz blocks. Moreover, local exchange telephone companies will be equally limited in most markets, because of affiliation with a cellular licensee. As a result, the spectrum will not be put to its highest and best use. The Broadband auction is likely to result in a less efficient, productive use of the spectrum than if there were few limits on bidding eligibility, as in the Narrowband auction.

^{19/} Rozek Affidavit, Exhibit I at 7-8.

^{20/} Rozek Affidavit, Exhibit I at 14.

2. Recovery of the Value of the Spectrum

Under the auction statute, the Commission must try to further the objective of recovering for the public "a portion of the value of the public spectrum resource made available for commercial use" while at the same time avoiding "unjust enrichment through the methods employed to award uses of that resource."^{21/} This objective is disserved by limiting cellular eligibility. Allowing cellular carriers to participate fully in the Broadband auctions will produce the highest prices, and thereby help achieve the other statutory objectives as well.^{22/}

Excluding potential high bidders, such as cellular carriers and their affiliated telephone companies, will diminish the revenue produced by the auction, resulting in recovery for the public of a much smaller portion of the value of the license. The unrecovered value is, in effect, a windfall to the high bidder. Keeping cellular carriers from bidding deprives the public of much of the value that might be recovered in an open-eligibility auction, and also enriches the winning bidder, who pays a below-market-value

^{21/} 47 U.S.C. § 309(j)(3)(C). While this section clearly authorizes the Commission to consider the revenue effects of its auction rules, it is not permitted to base its auction rules "*solely or predominantly* on the expectation of Federal revenues." 47 U.S.C. § 309(j)(7)(B) (emphasis added). Clearly, revenue production should not be the principal basis for lifting the eligibility restrictions, but the Commission is nevertheless obligated to consider the fact that limiting participation in the auctions will have a detrimental effect on the revenue produced. In fact, as BellSouth discusses below, maximizing the price paid in the auction is likely to lead to increased efficiency and more rapid roll-out of new services. See also Rozek Affidavit, Exhibit I at 6-7 and Appendix B.

^{22/} For example, maximizing the revenue produced will also tend to bring service to the public promptly. The Commission decided to use auctions for PCS because auctions will "award licenses quickly to those parties who value them most highly and who are therefore most likely to introduce service rapidly to the public." *Broadband Auction Rules* at ¶ 5. Maximizing auction prices also rewards bidders who can use spectrum more efficiently, thereby promoting the statutory objective of "efficient and intensive use" of the spectrum. 47 U.S.C. § 309(j)(3)(D). As discussed in Section I.B.1 above, excluding or unduly limiting bidders will not lead to the most efficient and productive use of the spectrum, and will instead reward those with less efficient use than the excluded party who would have bid a higher price.

price, without any substantial justification, contrary to the intent of Congress. The exclusion of cellular carriers, large and small, from bidding for 30 MHz MTA licenses finds no support in the statute and undermines the objectives Congress set for the Commission.

3. Promoting Competition and Providing Opportunities to a Wide Variety of Applicants

One of the four objectives that Congress set for the Commission was:

promoting economic opportunity and competition and ensuring that new and innovative technologies are readily accessible to the American people by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women.^{23/}

BellSouth submits that the restrictions on cellular participation in Broadband PCS disserve, rather than promote, this objective.

The principal way the Commission sought to further this objective when it adopted auction rules was by establishing the two Entrepreneur Blocks. This initiative creates competitive opportunities for smaller companies. The Entrepreneur Blocks will ensure that there is a diverse array of service providers competing to meet the customer's needs, furthering the statutory objectives set by Congress.

In fact, opening up the non-Entrepreneur Blocks, and particularly the 30 MHz MTA licenses, to bids by cellular carriers will further this objective as well. If cellular carriers (and their affiliated local telephone companies^{24/}) are ineligible for the 30 MHz MTA licenses in-region, there will be a limited variety of applicants for these licenses. The likely players are very large providers of cable television, Enhanced SMR, and interexchange service, as

^{23/} 47 U.S.C. § 309(j)(3)(B).

^{24/} Even many rural telephone companies will be ineligible for Broadband PCS, due to their cellular holdings, even though Congress specifically directed that the Commission provide them with opportunities to participate in providing new services.

well as media conglomerates and out-of-region cellular carriers. A few new independent ventures with substantial financial backing may also bid. The financial requirements for making a successful bid and then building a system, together with the need for telecommunications expertise, substantially limit the pool of potential applicants for the MTA licenses.

Making cellular carriers and affiliated telephone companies eligible in-region would add many more companies to the mix in total, and there would be two or more additional potential bidders in each MTA. Eliminating the restrictions on cellular eligibility will lead to greater diversity and a less concentrated industry, consistent with the statutory objective.^{25/}

4. Rapid Deployment of New Services

BellSouth submits that eliminating cellular eligibility restrictions and spectrum caps will serve the statutory objective of promoting "the development and rapid deployment of new technologies, products, and services for the benefit of the public, including those residing in rural areas."^{26/}

America's cellular carriers are uniquely experienced in carrying out this objective. They currently provide large-scale mobile service to virtually all population centers

^{25/} In the *Broadband Order*, the Commission relied on the need to "maximize the number of new viable and vigorous competitors" in Broadband PCS as a rationale for limiting cellular participation. *Broadband Order* at ¶ 103. This is a highly questionable rationale, however. First, limiting the eligibility of one class of "viable and vigorous competitors" lessens, not increases, the number of parties competing for licenses in any given market, as well as competing in the delivery of service in any given region. Second, maximizing the number of participants is not necessarily consistent with the statutory goal of competition or the Commission's own objective of competitive delivery, absent assurance that the participants will actively compete with each other. Third, the Commission ignores its goal of maximizing the number of competitors when it allows entities other than cellular carriers to aggregate as much as 40 MHz of Broadband PCS spectrum, thereby potentially *reducing* the number of Broadband PCS competitors from six to three.

^{26/} 47 U.S.C. § 309(j)(3)(A).

throughout the nation, including those in the 428 Rural Service Areas, and they are now extending coverage to all areas that can economically be provided with service, through the cellular fill-in and unserved area application processes. In many areas, they are deploying new analog and digital technologies to improve capacity, and new wireless data services are being introduced. Even so, the need to work within limits established by the 20-year-old analog cellular architecture and technology, and to maintain analog service compatibility, makes it difficult for cellular carriers to offer a full range of personal communications services.

If cellular carriers are given a full opportunity to bid for PCS spectrum, they are more likely than others to roll out new technologies and services. With facilities designed to provide reliable vehicular mobile service already in place, they are unlikely to use Broadband PCS spectrum to replicate their existing services; instead, they have the incentive to use this spectrum to employ alternative technologies and provide services for which their large-cell systems are not well-suited, such as walk-around microcellular service. This will enable them to provide a full range of services, including those they are unable to offer today.

Companies not providing cellular service may not have the same incentive or ability to use PCS licenses to provide new services. They will be more likely than cellular carriers to provide service resembling today's large-cell vehicular cellular service. Without an in-place cellular network, they are unlikely to be familiar with local radio propagation effects or the special needs of customers in the local market, including rural areas. Because cellular carriers are already in the business of providing local wireless services, they are uniquely positioned to be able to deploy new technologies and services promptly.

For these reasons, allowing cellular carriers to bid for the non-Entrepreneur Blocks on the same basis as other applicants would lead to a more diverse array of services, while the Entrepreneur Block guarantees that licenses will be granted to a wide variety of

companies, including those that have not traditionally participated in the provision of wireless services. In short, the Commission can best promote the availability of a wide variety of services by encouraging the full participation of companies that might otherwise be prevented from bidding.

C. There is No Valid Basis for Limiting Cellular Carriers' Eligibility to Participate Fully in Broadband PCS

BellSouth urges the Commission to eliminate the artificially low 10 MHz/15 MHz cap on cellular eligibility for Broadband PCS spectrum because it is unnecessary. In the *Broadband Order*, the Commission maintains that it will not "assume that in-market cellular providers will engage in illegal anticompetitive behavior," and asserts that it has no intention to craft rules "to prevent anticompetitive behavior which may or may not materialize."^{27/}

Nevertheless, the Commission limited cellular carriers to 10 MHz (increasing to 15 MHz in the year 2000) of Broadband PCS spectrum inconsistently with these principles. The Commission said it was adopting the limit because it was "persuaded by the argument" by PCS Action, an anti-cellular lobbying group, that "cellular carriers *might* be able to dominate the wireless market if they receive more than 10 MHz of PCS spectrum."^{28/} That group's *ex parte* letter, cited by the Commission, provided *no evidence, not even speculative assertion*, that cellular carriers would act anticompetitively.^{29/} In other words, the Commission limited

^{27/} *Broadband Order* at ¶ 103.

^{28/} *Broadband Order* at ¶ 67 (emphasis added) & n.83, citing Letter from PCS Action to the FCC (May 27, 1994). The letter indicated that PCS Action's membership consisted of American Personal Communications/Washington Post Company, Associated PCN Company, Cox Enterprises, Inc., Crown Media, MCI Telecommunications Corporation, Omnipoint Corporation, Times Mirror Cable Television, Inc., and Time Warner Telecommunications.

^{29/} See Letter from PCS Action to the FCC (May 27, 1994). The letter vigorously opposed allowing cellular carriers to have access to more than 10 MHz, claiming it would "fortify cellular's duopoly," "allow[] an in-region cellular operator to take away the ability of
(continued...)

cellular carriers to 10 MHz of Broadband PCS spectrum, based on the unsupportable assumption that cellular carriers will have insuperable competitive advantages over such companies as MCI and Time Warner,^{30/} and thereby "dominate" the competition.

BellSouth urges the Commission to heed its own counsel and not maintain regulatory restrictions to prevent an evil "which may or may not materialize," based on questionable assumptions instead of facts. Policy should not be driven by the possibility that there may conceivably be a few isolated cases of anticompetitive conduct; such cases can be dealt with appropriately on an *ad hoc* basis.

In any event, domination of the wireless market by cellular carriers is far from a certainty, and it is indeed very unlikely.^{31/} Cellular carriers will be competing against large

^{29/}(...continued)

other competitors to create 40 MHz licenses," and "prevent the creation of competitive PCS licenses." PCS Action's positions might have been appropriate regarding a cellular carriers' set-aside, but are baseless in a market-based licensing scheme. Cellular carriers could only prevent another company from gaining access to spectrum if they outbid the other company (presumably because they can put that spectrum to better use). If PCS Action's members can use the spectrum more productively than cellular carriers, cellular carriers will not be able to meet their bids, either at auction or in the aftermarket. It appears that PCS Action wants cellular carriers excluded from all but one 10 MHz block solely to ensure that its members get a windfall at the expense of the taxpayers.

^{30/} See note 28, *supra*.

^{31/} While the Commission recited concerns voiced about cellular domination contained in *ex parte* letters filed by cellular opponents, it failed to address evidence that cellular providers are unlikely to have the ability to dominate the wireless market. See, e.g., Letter from CTIA to Commissioner Barrett, dated February 4, 1994, enclosing CTIA's PCS White Paper No. 3, Second Series, "PCS Rules too Restrictive on Cellular, Study Finds: Antitrust Measurements Show Restrictions Not Necessary to Promote Competition" (February 4, 1994).

The number of competitors in a field does not necessarily correlate with the competitiveness of the field. For example, Dr. Rozek shows that local cellular market, where there are only two competitors, are considerably less concentrated than the cellular interexchange market, where there are multiple providers with one firm, AT&T, holding a dominant position. Rozek Affidavit, Exhibit I at 8-9. Thus, it is unlikely that cellular firms would have market power in the wireless field, when faced with multiple new competitors,
(continued...)

and powerful companies that they are unlikely to "dominate." Moreover, the wireless market is not monolithic. There are a wide variety of wireless services and technologies, and while there may be some degree of cross-elasticity amongst them, there are many differences, producing a heterogenous mix of services. The nature of this market makes it likely that there will be opportunities for many different participants, and domination by a single group of companies is unlikely, as long as the Commission does not create unnecessary entry and exit barriers.

Cellular carriers have been penalized for successfully developing the wireless market in spite of using outdated technology in order to comply with the Commission's requirement to provide standardized analog service. Having developed the potential of that technology to its fullest, cellular carriers are now denied the opportunity to make the transition to the next generation of wireless services, which will take advantage of today's (and tomorrow's) technologies and will meet needs that were undreamed of in the 1970s. Dr. Rozek concludes that even if they possessed market power in the wireless field when entering PCS, they would soon lose it due to the new technology:

Even if the incumbent firms possessed market power, they still would have an economic incentive to adopt a new technology rapidly if the new technology posed a competitive threat to their services. In the case of PCS, new entrants will market the new technology irrespective of the decisions of an integrated cellular-PCS firm. Thus, the integrated firm will have to adopt the new technology to compete effectively.^{32/}

^{31/}(...continued)

including Enhanced SMR and numerous Broadband PCS licensees, all of which will have similar capacity potential to the cellular operator and can thereby limit cellular carriers' ability to maintain supracompetitive price levels. In fact, Dr. Rozek concludes that the wireless market would be unconcentrated, by Justice Department standards. See Rozek Affidavit, Exhibit I at 10.

^{32/} Rozek Affidavit, Exhibit I at 10.

There is no basis for concluding that giving cellular carriers access to more than 10 MHz of Broadband PCS spectrum will position them to dominate wireless communications. Without the ability to continue the evolution of the services they provide, they are more likely to be dominated. Dr. Rozek states, "Cellular providers will not be able to remain viable wireless competitors without participating fully in the evolving wireless marketplace."^{33/}

The Commission should certainly be concerned about the *potential* of any company to dominate the market for wireless service, or to develop and abuse market power. The Commission should monitor developments in the PCS area to ensure that no firms are acting to deter competition. That does not mean, however, that it should adopt rules that freeze the ability of cellular carriers to expand their services and deploy new technology, merely because of concern for what might or might not happen.

The Commission has ample regulatory tools to address its competitive concerns without restricting entry at the outset. In the 1970s, there was substantial concern that allowing telephone companies to provide cellular service would lead to their domination of the cellular and dispatch markets.^{34/} Rather than place artificial limits on telephone company participation in cellular, the Commission determined to monitor technological and competitive developments and act accordingly. In 1976, the Court of Appeals sustained the Commission's decision to allow telephone companies to be eligible for cellular licenses, noting that

The Commission retains a duty of continual supervision of the development of the system as a whole, and this includes being on the lookout for anticom-

^{33/} Rozek Affidavit, Exhibit I at 11.

^{34/} See, e.g., *NARUC v. FCC*, 525 F.2d 630, 637-38 (D.C. Cir.), cert. denied, 425 U.S. 992 (1976).

petitive effects. The serious anticompetitive effects, if they arise at all, will do so only after full implementation begins.^{35/}

In the subsequent cellular rulemaking, the Commission considered and rejected limiting telephone companies' eligibility to hold cellular licenses in-region, despite the *possibility* that they would dominate cellular service.^{36/} Under Commission supervision, the cellular industry has developed free of such domination, and for many years a non-wireline carrier, McCaw, has been the largest cellular carrier in the nation.

BellSouth urges the Commission to eliminate rules that are designed to prevent the mere possibility that cellular carriers (or any other class of competitors) will dominate the wireless industry. Instead, the Commission should monitor the state of the industry and take action (such as imposing narrowly focused conditions on licenses) when needed in particular cases, based on the factual record before it.

II. IN THE ALTERNATIVE, THE COMMISSION SHOULD RELY ONLY ON THE GENERIC CMRS SPECTRUM CAP AND ELIMINATE PCS-SPECIFIC SPECTRUM CAPS

In the *Broadband Order*, the Commission maintained a 40 MHz cap on aggregation of Broadband PCS spectrum in general, but subjected companies with attributable interests in a local cellular system to a 10 MHz cap on Broadband PCS spectrum. This was accomplished by counting cellular carriers' 25 MHz of cellular spectrum toward a separate 35 MHz limit for combined cellular and Broadband PCS spectrum (increasing to 40 MHz in the year 2000).^{37/} Other commercial mobile radio service licensees, such as Enhanced

^{35/} *Id.*, 525 F.2d at 638 (footnote omitted).

^{36/} Compare *Cellular Communications Systems*, CC Docket 79-318, *Notice of Inquiry and Notice of Proposed Rulemaking*, 78 FCC 2d 984, 989-95 (1980), with *id.*, *Report and Order*, 86 FCC 2d 469, 482-98 (1981), *recon.*, 89 FCC 2d 58, 66-85 (1982)

^{37/} *Broadband Order* at ¶ 67.

SMRs, did not have their spectrum counted toward the PCS spectrum cap, however. Because of this, BellSouth petitioned for reconsideration of the *Second Report and Order*, arguing that if cellular spectrum was to be counted toward the PCS spectrum cap, other providers' spectrum should be treated likewise. BellSouth argued for changing the PCS and PCS-cellular spectrum caps to a uniform 45 MHz cap covering PCS, cellular, and Enhanced SMR spectrum, with a proportionate attribution system.^{38/}

In the *Broadband Order*, the Commission deferred its response to BellSouth's petition proposing an even-handed approach to access to PCS spectrum to a further rulemaking in the CMRS proceeding, Gen. Docket 93-252.^{39/} Thus, it did not fully address BellSouth's request, which would have ensured that cellular carriers without SMR interests would be eligible for 20 MHz of Broadband PCS spectrum. Two months later, the Commission adopted a decision in the CMRS docket. In its *CMRS Order*,^{40/} the Commission established a 45 MHz cap on the total amount of attributable PCS, cellular, and SMR spectrum an entity may hold. Now that the Commission has reached a decision on the generic cap issue previously deferred, it must address the issue of whether there remains any reason for separate spectrum caps in this docket.

BellSouth submits, consistent with its earlier petition for reconsideration, that the restrictions on cellular carriers' Broadband PCS holdings serve no legitimate purpose, would be more fully addressed by a general CMRS spectrum cap, and should be eliminated. This would allow cellular carriers to acquire not only 10 or 15 MHz of PCS spectrum, but 20

^{38/} See BellSouth's Petition for Reconsideration of the *Second Report and Order* in Gen. Docket 90-314, at 10-17; *Broadband Order* at ¶ 68.

^{39/} *Broadband Order* at ¶ 104 & n.158, citing *Commercial Mobile Radio Services*, Gen. Docket 93-252, *Further Notice of Proposed Rulemaking*, FCC 94-100 (May 20, 1994).

^{40/} *Third Report and Order*, Gen. Docket 93-252, FCC 94-212; see *News Release*, Report No. DC-2638, *Regulatory Framework for CMRS Completed* (August 9, 1994).